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NO. 1025

IN THE

Supreme Court of The United States

October Term, 1967

OTTO C. BOLES, Warden of the
West Virginia State Penitentiary,
Petitioner

v.

LEE SHEAR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

LEE SHEAR,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 5, 1967.

OPINIONS BELOW

The opinion of the District Court for the Northern District of West Virginia is reported in 263 F. Supp. 855. The memorandum decision of the Circuit Court has not yet been reported and was based upon that Court's decision in *Patton* v. *North Carolina*, 381 F. 2d 636 (4th Cir., 1967), rehearing en banc denied Sep-

tember 5, 1967. All of these opinions are reprinted in Appendix B, pp. 3-A-35-A.

JURISDICTION

The memorandum decision of the Circuit Court of Appeals reversing the judgment of the District Court and remanding the case was issued and filed on October 5, 1967. The petition to recall the memorandum decision and to stay the decision pending this application was filed on October 25, 1967, and granted by the Court of Appeals on October 26, 1967. The jurisdiction of this Court is invoked under 28 U. S. Code § 1254 (1).

QUESTION PRESENTED

Whether a state court has the right to increase punishment following a new trial and jury verdict where the first sentence imposed on the defendant's plea of guilty is less and vacated by the action of the defendant?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and statutes are printed in Appendix A, *infra*, pp. 1-A, 2-A.

STATEMENT

In February, 1964, Shear was charged with armed robbery in two separate, unrelated indictments and thereafter, while represented by two court appointed attorneys, pleaded guilty to both indictments. He was given two concurrent ten-year prison terms and incar-

cerated in the West Virginia State Penitentiary. In May, 1964, he petitioned the West Virginia Supreme Court of Appeals for a writ of habeas corpus[1] and the writ was refused in June, 1964.

Shear petitioned the federal district court for habeas corpus relief[2] and in September, 1964, after a plenary hearing, the district court set aside and voided the convictions and sentences on the ground that the pleas had been involuntary. The Court did, however, stay the order of release to enable the State to initiate proceedings for the purpose of retrying Shear on the two indictments.[3]

Represented by the two attorneys who had represented him in the federal habeas corpus proceeding, Shear went to jury trial on the two indictments and was found guilty of both charges. He was not tried before the same state trial court judge who had accepted his guilty pleas in February, 1964, and the trials occurred at different terms of court.[4] Prior to going to trial on the second indictment, Shear was sentenced to fifteen years for the first conviction and was thereafter given a consecutive fifteen-year sentence for the second conviction.[5] Under West Virginia law offenses of this nature carry a minimum sentence of ten years' confinement.[6]

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[1]Essentially, Shear alleged ineffective assistance of counsel and involuntariness of his plea as a result of threats made by his court-appointed counsel and the State court trial judge.

[2]The same grounds were relied upon in the District Court.

[3]See Order of Release, Appendix C, p. 36-A.

[4]Shear was tried on one indictment in October, 1964, and on the other in February, 1965, with different jury panels in each case.

[5]On January 11, 1965, he was sentenced to fifteen years for the October conviction and on February 3, 1965, to fifteen years for the second conviction.

[6]West Virginia Code, Chapter 61, Article 2, Section 12 (Michie, 1966), set out in its entirety in Appendix A, p. 1-A.

After an unsuccessful petition to the West Virginia Supreme Court of Appeals for habeas corpus in which the imposition of the more severe sentences was asserted,[7] Shear petitioned the federal district court for habeas corpus relief.[8] The district court dismissed the petition and the case was appealed to the Fourth Circuit Court of Appeals. However, upon request by the district court, the case was remanded to the district court by the Court of Appeals for the specific purpose of considering the constitutional aspects regarding a more severe second sentencing of a successful habeas corpus applicant in a renewed state prosecution. The district court, in a comprehensive memorandum opinion, concluded that the mere imposition of a more severe sentence, without more, did not amount to a constitutional deprivation and denied the writ.[9]

The district court granted Shear a certificate of probable cause to appeal, and on October 5, 1967, the Fourth Circuit Court of Appeals, on the basis of *Patton* v. *North Carolina*,[10] issued a memorandum decision in which the judgment of the district court was reversed and the case remanded for further proceeding.[11] The Fourth Circuit, in the *Patton* case, concluded that increasing punishment on retrial violated the Fourteenth Amendment in that it exacted an unconstitutional condition to the exercise of the right to a

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[7]Shear also contended that the trials violated the "double jeopardy" provisions of the federal Constitution and that he should have been reindicted prior to the subsequent trials.

[8]The district court found that Shear had not exhausted available state remedies.

[9]*Shear* v. *Boles*, 263 F. Supp. 85 (N. D. W. Va., 1967). The full text of the opinion is set out in Appendix B, p. 3-A.

[10]381 F. 2d 638 (4th Cir., 1967), decided June 14, 1967, rehearing en banc denied September 5, 1967. The full text of the opinion is set out in Appendix B, p. 18-A.

[11]The memorandum is set out in Appendix B, p. 34-A.

fair trial, arbitrarily denied equal protection of the law and placed a defendant twice in jeopardy of punishment for the same offense.

On October 25, 1967, the petitioner herein petitioned the Court of Appeals to recall the memorandum decision and to stay the decision pending application to this Court for a writ of certiorari. The Court of Appeals granted the petition on October 26, 1967.[12]

REASONS FOR GRANTING THE WRIT

The federal questions herein have been decided below in a way which is not in accord with the applicable decisions of this Court and are directly in conflict with decisions of other circuit courts of appeals and state courts. The decision constitutes a radical departure from established law and practice and has adversely affected and emasculated established sentencing practices of both state and federal trial courts.

I.

The circuit court's opinion concluded, *inter alia*, that "increasing Patton's punishment after his initial conviction constitutes a violation of his Fourteenth Amendment rights in that it * * * placed him twice in jeopardy of punishment for the same offense."[13] The decision below is in conflict with the long series of decisions of this Court that the Fifth Amendment's prohibition against double jeopardy is inapplicable to state court prosecutions under the due process clause of the Fourteenth Amendment. *Bartkus* v. *Illinois*, 359 U. S.

[12] See Order Staying Memorandum Decision, Appendix C, p. 38-A.
[13] 381 F. 2d at 646.

121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959); *Brock* v. *North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1953); *Palko* v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); *Brantley* v. *Georgia*, 217 U. S. 284, 30 S. Ct. 514, 54 L. Ed. 768 (1910).[14] This Court, in *Bartkus*, *supra*, at page 689 (L. Ed 2d) of the opinion, specifically reaffirmed its holding in *Palko*, *supra*, that:

> "* * * while at some point the cruelty of harrassment by multiple prosecutions by a State would offend due process, the specific limitation imposed on the Federal Government by the Double Jeopardy Clause of the Fifth Amendment did not bind the States."

The circuit court attempted to justify its holding on the basis that the prohibition against double jeopardy relates also to the *punishment* imposed for the offense of which the defendant was convicted.[15] In so holding, the circuit court is in direct conflict with the cornerstone decision of this Court in *Stroud* v. *United States*, 251 U. S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919), in which the court approved a death sentence in a federal prosecution, whereas the sentence on the first conviction was for life.[16] The court held that such procedure did not violate the federal

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[14]This Court specifically had the question of the applicability of the double jeopardy clause to the states in *Cichos* v. *Indiana*, 385 U. S. 76, 87 S. Ct. 271, 17 L. Ed. 2d 175 (1966), but did not reach or decide it.

[15]381 F. 2d at 644, 645. The circuit court relied on *Ex parte Lange*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872 (1873) which is clearly distinguishable and will be discussed *infra*.

[16]381 F. 2d at 644, 645. The circuit court attempted to distinguish *Stroud* on the basis of *Green* v. *United States*, 355 U. S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), even though this Court, in the *Green* case, specifically noted that *Stroud* was "clearly distinguishable." 2 L. Ed. 2d at 208, fn. 15. See also *People* v. *Henderson*, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963), (dissent).

constitutional ban on double jeopardy, reasoning, at page 18 (251 U. S.), that:

> "The protection afforded by the Constitution is against a second trial for the same offense."

Moreover, the circuit court's reliance upon *Ex parte Lange*, 85 U. S. (18 Wall.) 163, 21 L. Ed. 872 (1873), for its "double punishment" theory is misplaced,[17] inasmuch as this Court, in more recent decisions, has unequivocally announced that "the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.'" *United States* v. *Tateo*, 377 U. S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448, 453 (1964) (dissent); *Downum* v. *United States*, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963); *Ball* v. *United States*, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 ( ).

II.

The double jeopardy clause does not prevent retrial of a defendant whose conviction is set aside because of an error in the proceedings, *Forman* v. *United States*, 361 U. S. 416, 80 S. Ct. 481, 4 L. Ed. 2d 412 ( ), and it is immaterial that the conviction is overturned on collateral rather than direct attack. *United States* v. *Tateo*, 377 U. S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964). Accordingly, when the de-

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[17] The imposition of an increased sentence after an appeal must be distinguished from the case in which a sentence is increased without an appeal and without any affirmative action on the part of the defendant, such as in *Lange*. See 50 Va. Law Review 559, 563 (1964), fn. 11.

See also *United States* v. *Berry*, 282 U. S. 304, 51 S. Ct. 115, 75 L. Ed. 354, 358 (1931), where *Lange* was distinguished as a case where the statute authorized imprisonment, or fine, in the alternative only, and the sentence imposed both; the opinion merely holds that new sentence of imprisonment cannot be imposed after payment of the fine, which operated as a satisfaction of the prior judgment.

fendant seeks review, the subsequent imposition of a higher penalty does not constitute double jeopardy.

In this regard the circuit court's ruling is directly contrary to two holdings of this Court in *Stroud* v. *United States*, 251 U. S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919), and *Murphy* v. *Commonwealth of Massachusetts*, 177 U. S. 155, 20 S. Ct. 639, 44 L. Ed. 711 (1900), is in direct conflict with the holding of the Third Circuit Court of Appeals[18] and a majority of state courts.[19] Moreover, the decision appears to be in direct conflict with its own holdings in *Howell* v. *United States*,[20] 199 F. 2d 366 (4th Cir., 1952), and *Kitt* v. *United States*,[21] 138 F. 2d 842 (4th Cir., 1943).

In *United States ex rel. Starner* v. *Russell*, 378 F. 2d 808, 810 (3d Cir., 1967), the sole issue before the Court was "the right of a State court to increase punishment following a new trial where the first sentence imposed on the prisoner's plea of guilty is less and vacated." The Third Circuit, in a case similar to the instant case, held that the rule in the federal system is that a trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier va-

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[18]United States ex rel. *Starner* v. *Russell*, 378 F. 2d 808 (3d Cir., 1967.)

[19]See Annotation, 12 A. L. R. 3d 978 (1967).

[20]Howell's sentence had been declared void in a habeas corpus proceeding and, on resentencing, he contended the sentence had been increased. The Fourth Circuit rejected the contention and noted that "after petitioner * * * elected to treat the original 20 year sentence as void and * * * secured a judgment to that effect, he cannot claim any benefit as of right because of that sentence. If it is void, it amounts to nothing." *Id.* at 367.

[21]Similarly, when Kitt was remanded for resentencing, he "stood in the same position that he occupied when, after the jury's verdict of guilty, he first stood before the District Judge to be sentenced. * * * We * * * think he (judge) could have raised the sentence above the valid portion of the original sentence, provided, of course, he kept within the statutory limits." *Id.* at 843.

cated, and it is unnecessary to articulate the reason for any differentiation in the term of the sentence. In such a case, the defendant is held to have waived his protection against double jeopardy.[22] Accord, *Murphy* v. *Commonwealth of Massachusetts, supra; Sasser* v. *United States*, 352 F. 2d 796 (6th Cir., 1965); *Hayes* v. *United States*, 249 F. 2d 516 (D. C. Cir., 1957), cert. denied 356 U. S. 914, 78 S. Ct. 672, 2 L. Ed. 2d 586; *Robinson* v. *United States*, 144 F. 2d 392 (6th Cir., 1944), affirmed 324 U. S. 282, 65 S. Ct. 666, 89 L. Ed. 944; *King* v. *United States*, 98 F. 2d 291 (D. C. Cir., 1938); *Hammers* v. *United States*, 279 F. 265 (5th Cir., 1922); *Bryant* v. *United States*, 214 F. 51 (8th Cir., 1914). See also e.g., *State ex rel. Boner* v. *Boles*, 148 W. Va. 802, 137 S. E. 2d 418 (1964); *Moon* v. *State*, 1 Md. App. 569, 232 A. 2d 277 (1967); *Chambers* v. *State*, 199 Kan. 483, 430 P. 2d 241 (1967); *People* v. *Dillon*, 7 Mich. App. 365, 151 N. W. 2d 365 (1967); *Hicks* v. *Commonwealth*, 345 Mass. 126, 185 N. E. 2d 739 (1962); *Kohlfuss* v. *Warden*, 149 Conn. 692, 183 A. 2d 626 (1962); *Annotation* 12 A.L.R. 3d 978 (1967). The dilemma created by the conflict of decisions in the Circuit Courts of Appeals is best exemplified by *Moon* v. *State, supra*, wherein, at page 278, the Maryland Court stated:

> "In Marano v. United States, (1st Cir.) 374 F. 2d 583, the first circuit held that a greater sentence could not be imposed. In Patton v. State of North Carolina, (4th Cir.) ..... F. 2d ....., June 14, 1967, the fourth circuit also held

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[22] *Cichos* v. *Indiana*, 385 U. S. 76, 87 S. Ct. 271, 17 L. Ed. 2d 175 (1966), seems to have determined that an increased sentence on retrial is not a violation of the double jeopardy provision of the federal constitution. The crux of the decision is that the defendant could be retried on both counts and presumably given the maximum sentence of 21 years without violating the double jeopardy clause.

that a greater sentence could not be imposed. In United States ex rel. Starner v. Russell, (3rd Cir.) 378 F. 2d 808, May 25, 1967, the third circuit held that a heavier sentence could be imposed. *In the absence of an authoritative ruling by the Supreme Court of the United States, we shall continue to follow the rule as laid down in the Maryland cases*, especially, where as here, the indictment has been declared void, as opposed to a new trial under the same indictment after reversal." (Emphasis Supplied).

III.

The decision of the Fourth Circuit, with its constitutional underpinnings, emasculates the traditional discretion allowed trial judges in the sentencing process and is apparently in conflict with decisions of this Court and other circuit courts. In holding that a second sentencing judge could not, under any circumstances, increase a sentence following a successful appeal the Fourth Circuit has created an unwarranted irrebuttable presumption of injury in such cases.[23]

The facts in the instant case are more closely akin to those in *United States ex rel. Starner* v. *Russell*, 378 F. 2d 808 (3rd Cir., 1967), wherein the defendant had initially pleaded guilty, and after the previous charges had been vacated, pleaded not guilty. At page 810 of the opinion, the Third Circuit stated:

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[23]The district court held that Patton's punishment could not be increased unless evidence justifying a harsher sentence appeared in the record. 256 F. Supp. at 236. The Circuit Court rejected this. 381 F. 2d at 641. The Fourth Circuit, while ostensibly in accord with *Marano* v. *United States*, 374 F. 2d 583 (1st Cir., 1967), rejected language therein, characterized as "dictum", to the effect that in some circumstances it might not be inappropriate for the court to take subsequent events into account.

"Accordingly, it can be said the later sentence imposed by Judge Shughart was well within the limits fixed by the law, as the petitioner could have been sentenced for a period up to ten years on each count. *Here, the decision to impose the sentence given was within the discretion of the trial judge who had an opportunity to see and hear the accused and his witnesses. The trial judge below concluded, 'No prisoner should be punished for obtaining a new trial nor for pleading not guilty.' However, the record does not disclose that he was.*" (Emphasis Supplied).

The Third Circuit distinguished the *Marano* case, *supra*, and, at page 811, noted:

"* * * We differ with the court's opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. *To so hold would seem to trespass the integrity of the trial judge who, upon hearing all the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith,* even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive— penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in the light of the wider, factual area encompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty. While we are wholeheartedly in agreement with the principles laid down in Gideon v. Wainwright, supra, it must be conceded that only the fact of not

> being represented by counsel in the precourt proceedings gave him the second opportunity to plead his case and he chose to go to trial and have a jury test the accusations against him. *When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered.*" (Emphasis supplied).

At page 812 the Circuit Court concluded:

> "It is submitted it would be a flagrant trespass of an independent state judiciary, to question its discretionary judgment, in the imposition of a sentence, where the trial judge, in the possession of all the facts relative thereto, in a proceeding in a Federal court on a writ of habeas corpus—already ruled on by the highest tribunal of the state—would vacate the same, unless it clearly flouted constitutional standards of due process."

The District Court, in the instant case, via a comprehensive, well-reasoned opinion, concluded that a habeas corpus court could not assume the function and discretion of a sentencing court or judge the constitutionality of a second sentence merely by its length.[24] Logically, the District Court noted that various factors must be considered in evaluation of sentences by an appellate or other non-sentencing review court, e.g., that trial court is best equipped to observe the defendants' demeanor and the extenuating circumstances of the crime especially where, as here, the second conviction was on a jury verdict as contrasted with the

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[24] *Shear v. Boles*, 263 F. Supp. 85 (N. D. W. Va., 1967); see Appendix B, p. 3-A.

initial guilty plea,[25] whether the second sentencing judge manifested a hostile attitude, whether the second sentencing judge is the same judge who had imposed the first sentence,[26] etc.

The District Court applied this criteria to the instant case and concluded that the record did not reflect that Shear's second sentences were motivated by retributive intent. In so holding, the District Court was aware of the conflicting decision of the North Carolina District Court in *Patton* v. *North Carolina*, 256 F. Supp. 225 (W. D. N. C., 1966), but had no difficulty distinguishing the decision on the evidence presented therein.[27]

Moreover, the Fourth Circuit appears to be again at odds with one of its own decisions, *Stevens* v. *Warden*, 382 F. 2d 429 (4th Cir., 1967), wherein, at page 433, it is stated:

> "Meanwhile, however, the federal courts have no right to review any sentence of a state court which does not exceed the statutory maximum sentence which may be imposed under the laws of the state. Since the only thing wrong with the entire proceedings was the sentence, we are powerless to afford relief."

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[25] See, for example, People v. Henderson, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677, 696 (1963), (dissent), wherein defendant pleaded guilty at first trial and, on retrial, the record revealed evidence pertinent to both guilt and penalty characterized as "too revolting to unnecessarily detail."

[26] The judges were not the same in the instant case.

[27] The District Court, in *Patton*, concluded that harsher punishment was constitutionally permissible if there was a discernible reason therefor. The Fourth Circuit rejected this. Unlike Shear, in *Patton* the record indicated the second sentencing judge remarked that he "would teach these jail house lawyers" prior to imposing sentence.

As stated in *Williams* v. *Oklahoma*, 358 U. S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959), at page 522 (L. Ed. 2d):

> "* * * In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime. * * * Certainly one of the aggravating circumstances involved in this kidnaping crime was the fact that petitioner shot and killed the victim in the course of its commission. We cannot say that the sentencing judge was not entitled to consider that circumstance, along with all the other circumstances involved, in determining the proper sentence to be imposed for the kidnaping crime. * * *"

CONCLUSION

The decision below is palpably erroneous. Until the decision in the *Patton* and instant case, it had never been thought that when a judgment of conviction was reversed at the defendant's behest, the former sentence tied the hands of the trial judge in sentencing the defendant on a new judgment of conviction for the same offense rendered upon retrial. The most immediate effect is that a new category of "automatic" appeals has been carved out by judicial decision and constitutes still another unwarranted intrusion on state criminal procedure. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

(Date) Counsel for Petitioner

APPENDICES